87-320

NO. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES THOMAS PATTERSON, SR.-Petitioner

vs

LAWRENCE L. AIKEN, ET AL.-Respondents

-AND-

JAMES THOMAS PATTERSON, SR.-Petitioner

vs

DAVID H. FLINT, ET AL.-Respondents

ON WRIT OF CERTIORARI TO

Court of Appeals State of Georgia

PETITION FOR CERTIORARI

James Thomas Patterson, Sr.
329 Plantation Circle
Riverdale, Georgia 30296
(404) 996-6410
Petitioner

PETITION FOR CERTIORARI

A - QUESTIONS PRESENTED FOR REVIEW:

1) Whether Georgia statute (O.C.G.A.§9-11-9.1) which requires that the affidavit of an expert accompany the filing of a legal malpractice action is constitutional;

2) Whether the judgment and opinion of an expert witness may surplant the function of a jury in a legal malpractice action in those instances where the conduct complained of is such that jurors can readily understand it without the aid of an expert witness;

3) Whether a finding in favor of an attorney on a legal malpractice count exempts that attorney from all liability respecting breaches of contract and breaches of agency duties;

4) Whether expert testimony that fails to address the specific acts of malpractice complained of and which is unsupported by any evidence of the acceptability of such

conduct is a valid basis upon which to dismiss an action;

5) Whether utilization of a double standard in determining the acceptability of expert witnesses is a violation of the equal protection and due process clauses of the United States Constitution;

6) Whether a pro se litigant proceeding pursuant to 28 U.S.C.A. §1654 must provide expert testimony of an attorney in a legal malpractice case when as a matter of practice no attorney will accept employment as an expert from a non-attorney litigant who is proceeding pro se;

7) Whether expert testimony of an attorney defendant in a legal malpractice case warrants blind acceptance without scrutiny by the Court and without cross examination when the effect thereof is to rewrite the ethical rules of attorney conduct enacted by the Georgia Legislature.

B - LIST OF PARTIES:

1) James Thomas Patterson, Sr.-plaintiff (both cases)

2) Lawrence L. Aiken-defendant Aiken case

3) William C. Lanham-defendant Aiken case

4) Stanley E. Sacks - defendant Aiken case

5) Law Firm of Sacks, Sacks & Larkin-defendant Aiken case

6) David H. Flint-defendant Flint case

7) Warren O. Wheeler-defendant Flint case

8) Law Firm of Schreeder, Wheeler & Flint-defendant Flint case

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Berman v. Rubin, 227 S.E.2d 802

Bowden v. State, 238 S.E.2d 905

Gazaway v. Secured Ins., 136 S.E.2d 531

General Ins. Co. v. Camden, 154 S.E.2d 26

Hartford Accident v. Camp, 26 S.E.2d 679

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McGahee v. Phillips, 84 S.E.2d 19

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Western & ARR v. Fowler, 47 S.E.2d 874

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E-GROUNDS ON WHICH JURISDICTION INVOKED:

Fayette Superior Court-Patterson v. Aiken:

Summary Judgment - 3/14/86

Ga. Appeals Court Opinion - 3/17/87

Appeals Court Rehearing Denied - 3/30/87

Ga. Supreme Court Certiorari Denied - 5/7/87

Ga. Supreme Court Rehearing Denied - 6/17/87

Fulton Superior Court-Patterson v. Flint:

Summary Judgment - 3/20/86

Ga. Appeals Court Opinion - 4/8/87

Appeals Court Rehearing Denied - 4/16/87

Ga. Supreme Court Certiorari Denied - 5/7/87

Ga. Supreme Court Rehearing Denied - 5/27/87

Sections 1254, 1257, 2104 and 2106 of Title 28 of the U. S. Code authorizes the Supreme Court of the United States to review the judgments of State Courts when said State Courts have decided

Federal question(s) in a way that conflicts with other state courts of last resort or that conflicts with decisions of a Federal Court of Appeals or that conflicts with decisions of the U. S. Supreme Court or where the validity of a state statute is drawn in question on the ground of its being repugnant to the U. S. Constitution or laws of the United States or where any privilege is specially claimed under the Constitution or statutes of the United States.

F-CONSTITUTIONAL PROVISIONS AND STATUTES

1) U. S. Constitution, Amendment V, in pertinent part:

> "No person shall be...deprived of life, liberty, or property, without due process of law..."

2) U. S. Constitution, Amendment VII, in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,..."

3) U. S. Constitution, Amendment XIV, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4) 28 U.S.C.A.§1654 in pertinent part:

> "In all courts of the United States the parties may plead and conduct their own cases personally."

5) O.C.G.A.§9-11-9.1 in pertinent part:

> The complaint in any professional malpractice case must be accompanied by an affidavit of "an expert competent to testify" which sets forth "at least one negligent act or omission and the factual basis for such claim."

G-STATEMENT OF THE FACTS

In 1973 Petitioner constructed and opened a twin-screen motion picture theatre in the Jonesboro area of Clayton County, Georgia. After trying without success for two years to license films from the major film distributors on first run, petitioner

contracted with attorneys Warren Wheeler and David Flint to prosecute a civil action in Federal Court charging "splitting[1]" of films in violation of the Sherman Act and Clayton Act. The representation contract required that Wheeler and Flint expedite the action and prosecute the matter to a just resolution and required that petitioner provide factual support work, pay $25/hr for Wheeler's and Flint's time, pay litigation costs and pay a 25% contingency fee. Because Wheeler and Flint granted and sought and received dozens of extensions, discovery in the matter lasted four years. In 1980 summary judgment was granted to defendants. The Eleventh Circuit reversed summary judgment in April 1982. By that time petitioner had already paid to Wheeler and Flint more than $60,000 and his business was teetering on the

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1 Splitting is a process where chain theatres meet to divide among themselves the films available.

verge of bankruptcy. In April 1982 petitioner and Wheeler and Flint modified the representation contract to suspend the hourly payments until after trial and permit Wheeler and Flint to impose monthly interest charges retroactive to August 1980. In mid 1982 petitioner came into possession of documents that proved the "splitting" that had been alleged. Those documents had been concealed and withheld from document production by defendants in the face of a court order compelling their production. Petitioner gave copies of the documents to Wheeler and Flint with repeated oral and written instructions to move for sanctions, including judgment by default. Wheeler and Flint refused to obey petitioner's directive to move for sanctions. Defendants' second motion for summary judgment was denied in mid 1983. Shortly thereafter Wheeler and Flint began urging a second modification of the repre-

sentation agreement. Wheeler and Flint urged hourly billings be discontinued and their contingency be upped to 50%. Petitioner countered by urging an in-between percentage and a return of the $60,000 plus that had already been paid. The parties, being unable or unwilling to reach agreement on a new percentage, agreed instead to leave the percentage at 25% and the hourly rate at $25 and have Petitioner execute an open-ended note to cover fees already accrued and those to be accrued during trial. That agreement fell apart when the parties could not agreed upon the language of the note. Wheeler and Flint wanted a highly restrictive second mortgage on the theatre property. Petitioner could not agreed to such due to his need to borrow money. The pretrial order was entered on 2/10/84 and the pretrial conference scheduled for 4/2/84. On 3/12/84 Wheeler and Flint wrote Petitioner a let-

ter demanding execution of the second mortgage note on threat of their withdrawal. On 3/16/84 Petitioner wrote Wheeler and Flint urging they reconsider the ultimatum. Without responding to the 3/16/84 letter Wheeler and Flint filed a motion on 3/26/84 to withdraw. Petitioner opposed the motion. On 9/27/84 the Court granted their motion to withdraw. A number of pleadings were filed between 3/26/84 and 9/27/84, none of which Wheeler and Flint responded to. Petitioner was unable to locate attorneys willing to step into a nine-year-old antitrust action. When it appeared that the court was going to dismiss the action for want of prosecution, Petitioner wrote Wheeler and Flint urging them to either resume representation or at least recommend replacement counsel. They declined to do either. On 3/22/85 the action was dismissed for want of prosecution. During the course of the litigation

attorneys for the major film distributors not only participated in the withholding of documents but also made numerous false statements to the Court.

In early 1975 Petitioner became active with an association of independent theatre owners. In September 1975 Petitioner was elected national president of the National Independent Theatre Exhibitors association, NITE. As president of NITE Petitioner did extensive work with the U. S. Dept. of Justice in Washington as well as with numerous exhibitors and attorneys throughout the United States who were involved in litigation against the major film distributors. It was through that activity that Petitioner received broad experience in civil litigation and gained possession of documents which defendants had concealed and withheld from production in Petitioner's case being prosecuted by Wheeler and Flint. In 1976

and 1977 Petitioner developed two programs designed to increase the flow of films into the marketplace. The first called for film producers to submit their film projects through the program to theatre owners who would in turn commit to pay a minimum rental on the film when it was available. The commitments collectively were to be used by producers to obtain the financing necessary to produce the film. Petitioner inaugurated the program by contracting with the producers of "The Buddy Holly Story". After that film had been offered to theatre owners in two major markets, General Cinema Corp.[1] and Columbia Pictures induced the producers of the film to breach their contract with Petitioner and release the film through Columbia. The other program developed by Petitioner called for theatre owners to exhibit

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1 General Cinema owns the largest chain of theatres in the United States.

screen-ads and permit the revenue thus generated to flow into a common film financing fund called Screen Advertising Film Fund Corp., SAFFCO. After approximately 2,000 theatres had committed to show the ads the major film distributors, including Columbia Pictures, who collectively control 90% of the market, launched a campaign in which they, for the first time in history, stated their films would not be licensed to theatres showing screen-ads. In late 1977 and early 1978 Petitioner consulted with attorneys Stanley Sacks and William Lanham regarding the actions taken against his two film supply programs. Sacks in writing recommended two suits in Federal Court. Sacks and Lanham agreed to prosecute the actions to just resolutions for a 1/3rd contingency fee provided Petitioner pay the litigation costs and provide factual support work. A "Buddy Holly" I suit was filed in December 1978 against Columbia

Pictures and the Buddy Holly Story producers. For some reason Sacks left General Cinema out of that suit and, when the Court would not permit an amendment, Sacks filed a "Buddy Holly" II suit. The Screen-Ad suit was filed in March 1980 against the major film distributors. Lanham, without obtaining approval from Petitioner, relieved the Screen-Ad defendants from default judgment when they failed to file timely answers. After defendants in the Screen-Ad case failed to respond to interrogatories, Petitioner instructed Lanham to move for sanctions. He failed to follow Petitioner's directive. Lanham failed to follow Petitioner's directive to file a motion to compel production of documents in the Buddy Holly II and Screen-Ad cases. Lanham and Sacks failed to respond to defendants' motion for a protective order in the Buddy Holly I case. Lanham and Sacks failed to appear at approximately twenty

depositions taken in the Screen-Ad case. Sacks left during the middle of depositions taken in the Buddy Holly I case; leaving Petitioner alone to represent plaintiffs. Lanham and Sacks arranged for Petitioner to take three depositions in the Buddy Holly I case so they could attend to other business. After it was learned that the son of the Judge in the Buddy Holly cases was a Hollywood scriptwriter doing business with Columbia and General Cinema and the Judge's wife's cousin had been made a vice president of defendant Columbia, Petitioner orally and by letter instructed Sacks and Lanham to move for recusal. Sacks and Lanham refused to file the motion for to do so would have delayed trial of the matter. Petitioner instructed Sacks and Lanham to appeal a sanctions order; they failed to comply with Petitioner's directive.

Trial of the Buddy Holly I case commenced on August 16, 1982. The trial was

very one-sided in favor of Columbia so much so that Sacks moved for a mistrial. The motion was denied. Trial ended in September 1982 in favor of defendants. Immediately after trial Sacks told Petitioner unless Petitioner paid Sacks and Lanham $25,000 for the appeal and $100/hr for work on the other two cases that he and Lanham would withdraw. Being unable to afford the fee change demands and faced with an appeal notice deadline, Petitioner launched a search for replacement counsel. Petitioner at that time was not aware he could object to the withdrawal. Two days before expiration of the appeal notice deadline Petitioner located attorney Lawrence Aiken, a sole practitioner who worked out of his home. Dozens of other attorney contacts had been fruitless. Petitioner hired Aiken and the appeal notice was filed. Thereafter Sacks and Lanham were permitted by the Court to withdraw.

Aiken's representation was a disaster. He was uncooperative, inattentive and inept. As a result the appeal was lost and the other cases dismissed. Aiken abandoned the cases without even moving to withdraw. During the course of the Buddy Holly and Screen-Ad litigation defendants' attorneys suborned perjury, concealed documents and made false statements to the Court. Columbia Pictures not only made the Judge's wife's cousin a vice president but also hired and/or made contracts with four key witnesses.

In April and May 1985 Petitioner complained to the Georgia Bar about the conduct of the lawyers on both sides of all four cases. When by 7/15/87 the Georgia Bar had done nothing Petitioner filed a multimillion dollar suit in Federal Court against the lawyers for both sides in all four cases, the defendants, three judges, the State of Georgia, the Georgia Bar and

several other associated individuals. On 7/31/85 the Federal Court dismissed the action, holding the Federal claims were frivolous and declining to accept jurisdiction of the state-related claims.

Petitioner then filed, in August 1985, in the Superior Court of Fulton County, Georgia suit against Wheeler and Flint for malpractice, breach of contract and for equitable relief. Specifically Petitioner claims Wheeler and Flint by contract were obligated to expedite the action and see it through to a just resolution. Petitioner claims the numerous extensions sought and granted by Wheeler and Flint violated the agreement to expedite the action and their withdrawal violated the agreement to pursue the matter to a just resolution. Petitioner claims a) the contract breaches are malpractice; b) Wheeler and Flint's refusal to file the sanctions motion is a breach of contract, breach of agents' duty and mal-

practice, c) Wheeler and Flint's failure to allow any time for retention of replacement counsel, failure to take steps to prevent prejudice to their client's case, failure to turn over the litigation file and refusal to recommend replacement counsel are acts of malpractice and d) Wheeler and Flint's failure to respond to any of the pleadings filed between their motion to withdraw and the grant of that motion (6 months) are a breach of contract, breach of agents' duty and legal malpractice. Wheeler and Flint in December 1985 moved for summary judgment based upon their own expert testimony that they had done no wrong. Patterson, who by that time had considerable litigation experience and had served as an expert in several actions, offered his own affidavit in opposition and urged the Court to deny summary judgment utilizing O.C.G.A. 9-11-56(f) (authorizes trial courts to deny summary judgment when it has

been shown the party opposing summary judgment for good reason is unable to provide an opposing affidavit) because none of the attorneys Patterson contacted were willing to serve as his expert, even though some agreed the acts of Wheeler and Flint appeared to be negligent. In March 1986 the Fulton Superior Court granted summary judgment based upon the Court's perception that there were no issues of material fact for presentation to a jury since Petitioner had presented no expert testimony to oppose the defendant attorneys denial of wrong doing. The Superior Court made no analysis of the acts of negligence alleged to determine if any were so clear as to obviate the need of expert testimony. The breach of contract count and equitable relief counts were essentially ignored. Petitioner appealed to the Georgia Court of Appeals contending a) expert testimony is not required as to clear and palpable acts; b) as to acts that

were not clear and palpable Petitioner's own testimony qualifies as expert based upon his extensive litigation experience, c) defendants' expert testimony is inadmissible since it did not address the specific acts of negligence alleged and rested upon no evidence entered into the record of any other attorneys having engaged in such acts. The Georgia Appeals Court affirmed the Superior Court based solely on the perceived failure of Petitioner to offer testimony to offset that of the defendants' experts. The Georgia Supreme Court denied certiorari on 5/7/87 and denied motion for rehearing on 5/27/87.

In October 1985 Petitioner filed in the Superior Court of Fayette County, GA suit against Aiken, Sacks and Lanham for malpractice, breach of contract and for equitable relief. Specifically Petitioner claims Sacks and Lanham by contract were obligated to pursue the matters to just

resolutions. Petitioner claims a) that the refusals of Sacks and Lanham to file a motion to compel, a motion for recusal, a motion for sanctions and an appeal of a sanctions order are breaches of contract, breaches of agents' duty and malpractice, b) granting relief from default judgment without obtaining the client's permission is breach of contract, breach of agents' duty and malpractice, c) failure to appear for depositions and departing before completion of depositions are breaches of contract, breach of agents' duty and malpractice, d) failure to respond to motions made by defendents is breach of contract, breach of agents' duty and malpractice and e) that demanding a change in the representation agreement in mid-stream on threat of withdrawal and actual withdrawal are breaches of contract and malpractice. Sacks and Lanham, in November 1985, moved for summary judgment based upon their own expert testi-

mony that they had done no wrong. Patterson offered his own affidavit in opposition and did urge the Court to deny summary judgment on the grounds that none of the numerous attorneys contacted were willing to give expert testimony for the plaintiff even though several of the attorneys contacted agreed that the acts of Sacks and Lanham appeared to be negligent. In March 1986 Fayette Superior Court granted summary judgment based upon the Court's perception that there were no issues of material fact for presentation to a jury since Petitioner had presented no expert testimony to oppose the defendant attorneys denial of wrong doing. The Superior Court made no analysis of the acts of negligence alleged to determine if any were so clear as to obviate the need of expert testimony. The breach of contract count and equitable relief counts were essentially ignored. Petitioner appealed to the Georgia Court of

Appeals contending that a) expert testimony is not required as to clear and palpable acts, b) as to acts that were not clear and palpable Petitioner's own testimony qualifies as expert based upon his extensive litigation experience, c) defendants' expert testimony is inadmissible since it did not address the specific acts of negligence alleged and rested upon no evidence entered into the record of any other attorneys having engaged in such acts. The Georgia Appeals Court affirmed the Superior Court based solely on the perceived failure of Petitioner to offer testimony to offset that of the defendants' experts. The Georgia Supreme Court denied certiorari on May 7, 1987 and denied motion for rehearing on June 17, 1987.

During the January and February 1987 term of the Georgia General Assembly O.C.G.A. §9-11-9.1 was enacted which provided inter alia that any and all civil

actions alleging professional malpractice must be accompanied by the affidavit of an expert that sets forth at least one negligent act or omission. During arguments before the Georgia Supreme Court the fact and substance of this new Georgia law was raised.

H-STAGE IN THE PROCEDURES

In both cases summary judgment was granted in favor of the defendants in March 1986. In both cases the Georgia Court of Appeals affirmed the trial courts' judgments solely on the grounds that Petitioner failed to provide expert testimony to offset the denials of wrong doing by the defendant attorneys. In both cases the Supreme Court of Georgia denied certiorari and motions for rehearing without comments.

1) In respect to the constitutionality of Georgia Statute 9-11-9.1, respondents in the Aiken case cited the statute in their Brief Opposing Certiorari (p.13) to the

Supreme Court of Georgia. Petitioner raised the question of the constitutionality of the Statute in his Response Brief (p.5) to the Supreme Court of Georgia in the Aiken case and in his Motion for Reconsideration (p.8) to the Supreme Court of Georgia in both the Aiken and Flint cases. The Court denied certiorari without comment.

2) In respect to the constitutionality of permitting an expert witness to surplant the function of the jury where the acts of negligence are clear and palpable, Petitioner raised the question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Appellant's Brief (pp.10-17 & p.28) and in Appellant's Motion for Rehearing (pp.2-4 & p.6); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (pp.6-10 & p.11) and in Petitioner's Motion to Reconsider (p.8 & p.12); c) To the Georgia Court of Appeals in the Flint case in Appellant's

Brief (pp.10-14) and in Appellant's Response Brief (p.2&p.5); d) To the Georgia Supreme Court in the Flint case in the Petition for Certiorari (pp.6-15) and in Petitioner's Motion to Reconsider (pp. 8-12). The Appeals Court refused to address this question. The Supreme Court denied certiorari without comment.

3) In respect to granting to attorneys who are defendants in a legal malpractice action exemptions from the laws of agency and the laws of contract, Petitioner raised the question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Appellant's Brief (pp.24-27) and in Appellant's Motion for Rehearing (pp.5-7); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (pp.14-16); c) To the Georgia Court of Appeals in the Flint case in Appellant's Brief (pp.21-24 & 27) and in Appellant's Response Brief in (pp.

5&6); d) To the Georgia Supreme Court in the Flint case in the Petition for Certiorari (pp.17-19). The Appeals Court refused to address these questions. The Supreme Court denied certiorari without comment. 4) In respect to using inadmissible testimony of the defendants to serve as the sole basis upon which the actions were dismissed Petitioner raised the constitutionality question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Appellant's Brief (pp.10-28);and in Appellant's Motion For Rehearing (pp. 1-5); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (pp.14-16); c) To the Georgia Court of Appeals in the Flint case in Appellant's Brief (pp.14-16 & p.26) and in Appellant's Response Brief (p.4); d) To the Georgia Supreme Court in the Flint case in the Petition For Certiorari (p.6 & pp.19-21). The Appeals Court refused to address the

question. The Supreme Court denied certiorari without comment.

5) In respect to the constitutionality of utilizing a double standard in determining whether to accept expert testimony, Petitioner raised the question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Patterson's Affidavit (pp.1-4), in Appellant's Reply to Appellees' Supplemental Brief (pp.2-3) and in Appellant's Motion for Rehearing (pp.5-6); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (pp. 4,13-14) and in Petitioner's Response Brief (pp.5-6); c) To the Georgia Court of Appeals in the Flint case in Appellant's Brief (pp.16-18&27) and in Appellant's Response Brief (p.7); d) To the Georgia Supreme Court in the Flint case in the Petition for Certiorari (pp.5-6&16-17). The Appeals Court refused to address the question. The Supreme Court denied cer-

tiorari without comment.

6) In respect to the constitutionality and legality of requiring a pro se litigant to provide expert testimony from an attorney in a legal malpractice case, Petitioner raised the constitutionality question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Appellant's Brief (pp.21-24) and in Patterson's Affidavit (p.4); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (PP.4,9,12,13&16) and in Petitioner's Response Brief (p.5); c) To the Georgia Court of Appeals in the Flint case in Appellant's Response Brief (pp.3-4); d) To the Georgia Supreme Court in the Flint case in the Petition for Certiorari (pp.6,10,21).The Appeals Court refused to address the question. The Supreme Court denied certiorari without comment.

7) In respect to the constitutionality of accepting without scrutiny and cross exami-

nation expert testimony from defendants in a legal malpractice action, Petitioner raised the constitutionality question in the following instances: a) To the Georgia Court of Appeals in the Aiken case in Appellant's Brief (pp. 21,24&28); b) To the Georgia Supreme Court in the Aiken case in the Petition for Certiorari (pp.9-13); c) To the Georgia Supreme Court in the Flint case in the Petition for Certiorari (pp.11-16); The Appeals Court refused to address the question. The Supreme Court denied certiorari without comment.

J - ARGUMENTS

The cases before the Bar involve Federal constitutional provisions of due process, trial by jury, abridgement of citizen privileges and equal protection of the laws. In the instant cases the Georgia Courts have taken the position that if a lawsuit alleges legal malpractice the plaintiff must produce the testimony of an attorney

in support of his claims in order to survive a motion for summary judgment. In so doing the Georgia Courts have taken the position that every alleged act of negligence must be interpreted for the jury by attorneys and that the defendant(s) may in fact provide such interpretation in his own behalf. In other words, unless a plaintiff can obtain the services of an attorney to offer opinion that the defendant attorney(s) were negligent the plaintiff cannot proceed beyond a motion for summary judgment on any of the counts of the complaint. In the instant cases the complaints alleged legal malpractice and breach of contract. In both cases the defendant attorneys submitted their own highly generalized affidavits stating they had done no wrong. In both cases the plaintiff, proceeding pro se, could not persuade an attorney to give testimony against their fellow attorneys even though some of the attorneys contacted

agreed there was negligence and even though plaintiff agreed to pay their normal hourly rates. In both cases plaintiff offered his own very specific affidavit to raise material issues of fact. In both cases the defendants failed to address the specific acts of negligence alleged and failed to offer evidence that any other attorneys had ever committed the acts of which the defendants are accused. In effect the so-called expert testimony offered by defendants was nothing more than unsupported self-serving denials. The Georgia courts responded by granting and affirming summary judgment on both the malpractice and breach of contract counts based solely upon plaintiff's inability to provide the affidavit of an attorney. Neither the trial courts nor the appeals courts made any analysis of the acts of negligence alleged so as to determine if a jury could comprehend correctly the attorney's duty to their client and whether or

not there has been a breach of the duty owed to their client. The courts took the position that every act of alleged negligence had to be interpreted for the jury by an attorney and that if a party could not prevail in tort (malpractice) that the party could not prevail in contract. The courts gave no consideration to plaintiff's affidavits even though defendant Sacks by letter told Patterson that he was as good a lawyer as 98% of the lawyers he knew and even though the Fulton Superior Court stated that Patterson in handling his case showed as much skill, knowledge and insight as many lawyers.

UP UNTIL NOW Georgia has held expert testimony is not required where the alleged acts of negligence were clear and palpable. In Pilgrim v. Landham, 63 Ga. App. 454 the Court stated:

> "This is not one of those cases where the question of negligence was one that could be determined without

resort to expert testimony, because facts, although connected with medicine, were so well known as not to require expert testimony to place them before the jury; it is not one of those matters which jurors must be credited with knowing by reasons of common knowledge..."

In Hughes v. Malone, 146 Ga. App. 345, 349 the Court stated:

"except in clear and palpable cases expert testimony is necessary to establish the parameters of acceptable professional conduct...thus, the evidence presents not a case of deliberate or negligent inaction but a case of full knowledge and deliberate tactical choices made in complete good faith."

In McGahee v. Phillips, 211 Ga. 118 the Court stated:

"Where jury is as competent as witness to draw conclusions from facts testified to, a witness' opinion based on such fact is inadmissible."

In Williams v. Williams, 115 Ga. App. 168 the Court stated:

"Opinion of witness is not admissible when all facts and circumstances are capable of being described so that jury may as readily as the witness form a correct conclusion from them."

In Gazaway v. Secured Ins. Co., 109 Ga.App. 428 the Court stated:

> "Opinion of witness is inadmissible when all facts and circumstances are capable of being clearly detailed and described, so that jurors may be able readily to form their own conclusion therefrom."

In Barnes v. Thomas, 72 Ga. App. 827 the Court stated:

> "Even expert opinions are allowed only by way of exception to general rule that witness is to give facts observed but not his conclusions from them, and they are to be allowed only when there is a real helpfulness or a necessity to resort to them."

UP UNTIL NOW Georgia has held that witnesses, even experts, will not be permitted to usurp the exclusive function of the jury. In General Ins. Co. of America v. Camden Constr. Co., 115 Ga. App. 189, the Court stated:

> "A witness will not be permitted to decide the very question which the jury are to pass on but must state the revelant facts and let the jury draw their own conclusions therefrom."

In Travelers' Ins. Co. v. Thornton, 119 Ga. 455, the Court stated:

> "An expert may aid the jury, but he cannot, under the guise of giving testimony, state a legal conclusion."

In Western & A.R.R. v. Fowler, 77 Ga. App. 206, the Court stated:

> "The opinions of expert witnesses on questions of science, skill and like questions are admissible, provided they are based on facts supported by other witnesses."

In State Highway Dept. v. Raines, 129 Ga. App. 123, the Court stated:

> "Where an opinion is not supported by facts testified to as the basis for it, it has no probative value and cannot support a verdict."

In Berman v. Rubin, 138 Ga. App. 849 the Court stated:

> "In malpractice action against attorneys, it is essential that competent evidence be presented as to the acceptability of particular conduct."

UP UNTIL NOW Georgia has held that experience will qualify one to be an expert as well as study. In Bowden v. State, 239 Ga.

821, 826, the Court stated:

> "nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade or profession, although the special knowledge required to qualify as an expert may be derived from experience as well as study."

Now, however, Georgia Courts through the instant cases have altered their historic and constitutionally sound positions to conform to the newly enacted Georgia Law, O.C.G.A. §9-11-9.1. In so doing, Georgia Courts have ruled upon Federal questions in conflict with decision of other state courts of last resort, in conflict with decisions of a Federal Court of Appeals, in conflict with decisions of the United States Supreme Court and have established precedent in Georgia that conflicts with the Constitution of the United States. In U.S. v. Ward, 169 F2d 460 (C.A. Pa. 1948) the Court stated:

> "Experts may not usurp exclusive function of jury to weigh evidence."

In United Telecommunications Corp., 536 F. 2d 1310 (C.A. Col 1976) the Court stated:

> "Expert testimony is not necessary where the matter in issue is such that the jury can be expected to draw the correct inferences from the facts presented."

In Brubaker v. Board of Education School Dist. 149 Cook County Illinois, (C.A. Ill. 1974) 502 F.2d 973, cert denied 95 S.Ct. 1953, 421 U.S. 965, 44 L.Ed 2d 451, clarified 527 F.2d 611, the Court stated:

> "Experts are not needed to support a conclusion that is obvious."

In O'Neil v. Bergan (1982 Dist. Col. App) 452 A2d 337, the Court stated:

> "In legal malpractice action, plaintiff must present expert testimony establishing standard of care unless attorney's lack of care and skill is so obvious that trier of fact can find negligence as a matter of common knowledge."

In Glidden v. Terranova, (1981 Mass App) 427 NE 2nd 1169, the Court stated:

> "Expert testimony is not essential where the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge

or experience to recognize of infer negligence from the facts."

In Muse v. St. Paul Fire & Marine Ins. Co.

(1976 La. App) 328 So2d 698, Court stated:

"there are cases in which the attorney's conduct is such as to constitute failure to use due care under any reasonable standard, thereby making the use of expert testimony unnecessary to establish a criterion of care."

In Sorenson v. Fio Rito (1980) 90 Ill.App.

3d 368, 45 Ill. Dec 714, 413 NE 2d the

Court stated:

"Where the record discloses obvious and explicit carelessness in the defendant's failure to meet the duty of care owed by him to the plaintiff, the court said, it will not require expert testimony to define further that which is already abundantly clear."

In Olfe v. Gordon (1980) 93 Wis. 2d 173,

286 NW 573, the Court stated:

"attorney's failure to fulfill his client's instruction...amounts to the sort of negligence for which expert testimony was not required.. cases involving conduct not necessarily related to legal expertise.. hold attorney liable for his failure to effectuate client's intent..

attorney was agent of client and as such duties were established not by the legal profession's standards but by the law of agency which a jury is competent to understand."

"expert testimony not required where the matters to be proved do not involve special knowledge or skill or experience which are not within the realm of the ordinary experience of mankind."

In Watkins v. Sheppard (1973 La App) 278 So 2d 890, the Court stated:

"in many cases the trial court, which is of necessity familiar with the standards of practice in its community, is competent to make such a determination (attorney's negligence) without the assistance of expert testimony."

"and there may also be cases in which the failure of the practitioner to use due care under any reasonable standard of conduct may be so obvious as to make expert testimony unnecessary."

In Collins v. Greenstein (1979) 61 Hawaii 26, 595 P2d 275 the Court stated:

"The court said that it agreed with the reasoning of the majority of courts that in some situations proof of negligence may be sufficiently clear without the aid of experts."

In Steinburg v. Indemnity Ins. Co. of North America, 364 F2d 266 (C.A. La. 1966) the Court stated:

> "If a question is one which the layman is competent to determine for himself, opinion testimony is excluded."

In U. S. v. Scavo, 593 F2d 837 (A Minn 1979) the Court stated:

> "Not all expert testimony is admissible under Rule 704 of these rules, but, rather, expert testimony must still meet criterion of helpfulness."

In Walker v. North Dakota Eye Clinic Ltd. 415 F. Supp 891, D.C. N.D. 1976 the Court stated:

> "In a medical malpractice action, expert testimony is not necessary to establish a duty the breach of which is a blunder so egregious that a layman is capable of comprehending its enormity."

It is clear from the cases cited above that Georgia Courts did err in requiring plaintiff to produce testimony of an attorney to survive summary judgment as to acts that are clear and palpable. An analysis of the acts of negligence alleged shows not the

exercise of judgment, knowledge and skill, but, instead, deliberate and negligent inaction.

1) O.C.G.A.§9-11-9.1 violates the due process and equal protection provisions of the U. S. Constitution. O.C.G.A.§9-11-9.1 requires that with the filing of a legal malpractice action the complaintant must file also an affidavit from a qualified expert that sets forth at least one act of negligence. Without the affidavit the suit will not be accepted. No distinction is made as to the character of the act of negligence. As a matter of practice no attorney will serve as an expert for a litigant who is proceeding pro se. The effect of 9-11-9.1 is to convey upon attorneys special privileges and to deprive non-attorneys from prosecuting legal malpractice actions pro se. A person's right to file an action is guaranteed by Amendment XIV of the U. S. Constitution and their right to prosecute

the action without aid of an attorney is guaranteed by 28 U.S.C.A.§ 1654. A party who is damaged by an attorney's negligence is entitled to bring suit against that attorney and is entitled to have a jury decide any questions of fact in respect thereto. O.C.G.A.§9-11-9.1 takes from a party his right to sue pro se and from the jury their right to judge from the evidence whether or not there was actionable negligence. O.C.G.A.§9-11-9.1 is unconstitutional and should be struck down by This Court.

2) Prior to the rulings in Patterson v. Aiken, et al and Patterson v. Flint, et al, Georgia Courts have consistently held that opinions of experts are not required to survive a motion for summary judgment in a legal malpractice action where the acts of negligence complained of were such a juror could correctly understand them without aid of an expert. Generally Georgia courts

have held that exercises of skill, knowledge and judgment by an attorney on behalf of his client required the testimony of an expert to set forth the standard of care required, but that deliberate or negligent inaction, which a juror can understand using his common sense, would not require expert testimony. The rulings in the instant actions have made no attempt to distinguish between clear and palpable acts and acts that were not. The rulings in the instant action have taken the position <u>every act of negligence</u> requires the opinion of an expert attesting to negligence before the matter may be considered by a jury. The effect of these rulings is to surplant the function of the jury in all cases in which the complaintant fails to provide expert testimony, no matter the clarity of the conduct complained of. In the instance cases the acts complained of are easily understood by a juror, being for the most

part deliberate and negligent inaction. Any juror can understand what it means when an attorney in mid-stream demands a change in the representation contract on threat of withdrawal. Any juror can understand what it means when directives were given and not complied with. Any juror can understand what it means when attorneys failed to appear at depositions, left in the middle of depositions and failed to respond to pleadings filed in the cases. These were not acts of skill, knowledge and judgment, but were, instead, clear and deliberate inactions. Where the jury is competent to understand but prevented from exercising its constitutional right to make a judgment as to the facts, due process does not exist. "Experts may not usurp exclusive function of jury to weight evidence", U.S. v. Ward, supra. "Expert testimony is not necessary where the matter in issue is such that the jury can be expected to draw the correct

inferences from the facts presented", United Telecommunications Corp., supra. "Experts are not needed to support a conclusion that is obvious", Brubaker v. Board of Education School Dist 149 Cook County Illinois, supra.

3) In the instant cases the Georgia Courts took the position that since the plaintiff did not prevail on the legal malpractice count he then was foreclosed from pursuing the breach of contract counts. No law was cited in support of the courts' position. The effect of the courts' rulings was to exempt the attorneys from the laws of contract and the laws of agency which effectively deprived the petitioner of his right of due process, right to trial by jury and to equal protection of the laws. The questions of whether or not contracts were altered by the mutual consent of the parties or whether or not contracts were breached are jury questions. Petitioner's affidavit

was more than sufficient to raise the necessary questions of material facts. In other cases involving breach of contract, but not legal malpractice, Petitioner's affidavit has been accepted as sufficient to raise questions of material fact. But in this case the Georgia Courts have in effect conferred upon attorneys special privileges permitting them to breach contracts and breach their duties as agents because their accuser was unable to meet the more stringent burden of getting an attorney to testify against his fellow bar members. Clearly, the rulings in these actions deprives Petitioner of equal protection of the laws.

4) In the cases before the bar the defendants, appearing as their own experts, supplied affidavits in which they failed to specifically address the charges made against them. They did not deny they had failed to obey directives. They did not

deny they had failed to attend depositions and failed to respond to pleadings. They did not deny they had demanded changes in their representation contracts. Nor did they deny they had withdrawn to the hurt of their client. They simply stated that everything they did complied with acceptable standards. No evidence was entered into the record that any other attorney had ever done the things of which they are accused. No quotations from the "canons" were introduced to justify their actions. They simply offered the non-specific opinions that their actions were consistent with that of other attorneys in similar situations. "In order to be an expert one must be in a position to testify as an expert and not as a partisan". Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397 (D.C. Va. 1975) Allowing an attorney to appear as his own expert hardly qualifies as non-partisan,

yet Georgia Courts have overwhelmingly embraced that practice. Function of an expert witness is to analyze the evidence in the record and, using that which qualifies him as an expert, offer an opinion as to specific actions, occurances or conditions.

> "The opinions of expert witnesses on questions of science, skill and like questions are admissible, provided they are based on facts supported by other witnesses." Code 38-1710 Western & A.R.R. v. Fowler, 77 Ga. App. 206. (see also Steven W. Brown Radiology Assc. v. Gowers, 157 Ga. App. 770)

> "Where an opinion is not supported by facts testified to as the basis for it, it has no probative value and cannot support a verdict." Code 38-1709, State Highway Dept. v. Raines, 129 Ga. App. 123

> "In malpractice action against attorneys, it is essential that competent evidence be presented as to the acceptability of particular conduct." Berman v. Rubin, 138 Ga. App. 849

In the instant cases no evidence was introduced as to what other attorneys had done in such circumstances and no opinion was offered as to the acceptability of parti-

cular conduct. The affidavits of the defendants were nothing more than generalized denials and are, therefore, not probative and are, therefore, insufficient basis upon which to dismiss the actions. Utilization of inadmissible and non-probative testimony to serve as the sole basis upon which the actions were dismissed while rejecting Petitioner's very specific testimony is a denial of due process and equal protection of the laws.

5) Petitioner offered his own affidavits to offset the affidavits of the defendants. The Courts, however, without comment or reason rejected Petitioner's affidavits. Petitioner showed the courts that his experiences qualified him to give expert testimony in the instant cases. Petitioner showed the courts a letter from defendant Sacks in which Sacks stated that Petitioner was a better lawyer than 98% of the lawyers he knew. Petitioner showed the courts

that the Judge of the Fulton Superior Court, in his summary judgment order, stated that Petitioner in representing himself before the court had demonstrated as much skill, knowledge and insight as many lawyers. Yet, despite these acknowledgements, the courts rejected Petitioner's own expert testimony. This the courts did despite the following rulings:

> "nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular trade of profession, although the special knowledge required to qualify as an expert may be derived from experience as well as study. Bowden v. State, supra

> "Expert witness need not be registered or the holder of degrees or certificates in order to become qualified." Smith v. Hobart Mfg. Co. 185 F. Supp. 751 (D.C. Pa. 1960)

> "Generally, one may become qualified as expert by practical experience, and professional education is not prerequisite." Southern Cement Co. Division of Martin-Marietta Coop. v. Sproul, 378 F.2d 48 (C.A. Ala 1967)

> "If experience or training enables a proffered expert witness to form an opinion which would aid jury,

> his testimony will be received, in the absence of some countervailing consideration. Norton v. Railway Exp. Agency, Inc. 412 F2d 112, C.A. Pa 1969, See also U.S. v. Dellinger 472 F.2d 340, C.A. Ill 1972, cert denied 93 S.Ct. 1443, 410 U.S. 970 35 L. Ed 2d 706

Clearly the rejection of Petitioner's testimony opposing the testimony of the defendants deprived Petitioner of due process, trial by jury and equal protection of the laws.

6) The Georgia Courts were well aware that Petitioner was proceeding pro se pursuant to 28 U.S.C.A.§ 1654. The Georgia Courts were advised by affidavits from Petitioner that many attorneys had been approached by Petitioner and had been offered employment as experts for Petitioner on terms quoted by said attorneys. The Georgia Courts were advised that no attorney could be found who was willing to serve as an expert for a pro se litigant even though many of the attorneys contacted agreed the actions attributed to the defendants ap-

peared to be negligence. Petitioner appealed to the Superior Courts to deny summary judgment utilizing O.C.G.A.§9-11-56(f) which authorizes courts to deny summary judgment when they have been shown the party opposing summary judgment is unable to obtain an opposing affidavit. The effect of the responses by the Georgia Courts is to nullify 28 U.S.C.A.§1654 for legal malpractice cases. One could argue that there are attorneys who will serve as an expert for a pro se litigant. That argument however is only hypothetical. Petitioner's experience and common sense indicates that none are available. The insistence by the Georgia Courts, and now the Georgia legislature, that a party offer the expert testimony of an attorney in all legal malpractice cases deprives Petitioner of due process, trial by jury, equal protection of the laws and utilization of 28 U.S.C.A.§ 1654.

7) The testimony of the attorney defendants was not subjected to scrutiny by the Courts nor permitted to be cross-examined by Petitioner. The Georgia Legislature has enacted lengthy and fairly specific canons of professional conduct for attorneys. One provision of the canons requires that before an attorney may withdraw from representation he must take all steps necessary to avoid prejudice to his client, must give the client adequate time to locate replacement counsel, must turn over the litigation file and must recommend replacement counsel. The defendants in the instant cases did none of these things. Yet they as "experts" stated everything they did was in compliance with accepted professional standards. The courts accepted their statements without scrutiny and without cross-examination. Such a practice, when unopposed by a counter expert opinion and affirmed by the Appeals

Courts, in effect, rewrites the canons enacted by the Georgia Legislature. The standards become whatever an attorney is willing to say they are. It's like letting automobile drivers set their own speed limits. Courts should scrutinize the testimony of defendants serving as their own experts and compare it to the standards set by the Legislature. To do otherwise is to violate the separation of powers provisions of the U. S. Constitution. Failure to permit cross-examination of the defendants' testimony violates the due process clauses of the U. S. Constitution.

CONCLUSION

The rulings in the instant cases coupled with O.C.G.A. §9-11-9.1 are a dangerous infringement upon the Bill of Rights portion of the U. S. Constitution, and the right of a person to prosecute his actions pro se. Petitioner concedes that in some instances a jury needs help

in understanding complex and highly technical negligence. But, where the acts of alleged negligence are easily understood by a juror and where the Standard of Care has been enacted by the Legislature, the testimony of experts may not be used to surplant the function of the jury. Petitioner concedes that acceptance of expert testimony is for the discretion of the trial court. But, the court who would exclude a witness, is obligated to state its reasons therefor so that a judgment can be made as to whether or not such exclusion is an abuse of discretion. In the instant cases the trial courts with the Appeals Court's affirmation totally ignored Petitioner's countering testimony, failing even to state a reason for its exclusion. The whole idea that an attorney defendant in a legal malpractice case can offer "as an expert" his own "impartial" testimony in the form of non-specific denials of wrong

doing, based upon no evidence of other attorneys' conduct and no reference to the canons enacted by the Legislature, is repugnant to the Constitution of the United States and does make a mockery of the judicial system. Equally repugnant is the precedent set by these rulings that exempts an attorney from the laws of contract and agency when the complaintant is unable to get an attorney to testify that a fellow attorney is guilty of negligence. The cases cited heretofore herein show clearly that the present posture of the Georgia Courts is contrary to that of other state courts of last resort, contrary to decisions of Federal Appeals Courts and contrary to decisions of This Court. For the reasons given herein it is respectfully urged that this Petition for Certiorari be granted.

This 17th day of July, 1987.

By James Thomas Patterson Sr. - Petitioner
James Thomas Patterson, Sr.

PROOF OF SERVICE

STATE OF GEORGIA,
COUNTY OF CLAYTON.

James Thomas Patterson, Sr., after being duly sworn, deposes and says that pursuant to Rule 28 of this Court he has served the Petition for Writ of Certiorari on counsel for the Respondents by enclosing a copy thereof in envelopes, first class postage prepaid, addressed:

Mr. Clark H. McGehee
Johnson & Ward
1750 Equitable Bldg.
100 Peachtree St.
Atlanta, GA 30303

Mr. James McDonald
Swift, Currie,
McGhee & Hiers
P. O. Box 54247
Atlanta, GA 30379

Mr. Richard Parker
Bradford & Parker
P. O. Drawer 6937
Marietta, GA 30065

Mr. Charles Hyatt
201 Trust Bldg.
545 N. McDonough St.
Decatur, GA 30032

and depositing same in the U. S. Mail at Riverdale, GA on the 7 day of July, 1987.

James Thomas Patterson, Sr.
329 Plantation Circle
Riverdale, GA 30296

Subscribed and Sworn to before me this 7 day of July, 1987

Notary Public

Notary Public, Georgia, State At Large
My Commission Expires Sept. 27, 1987